THE

Madras Weekly Notes.

1911] Sunday, October 29, 1911 [1911

S. 32, Cl. 1 OF THE INDIAN EVIDENCE ACT.

The admissibility of what are known as dying declarations is a very important question in the law of evidence. The Indian Evidence Act deals with the subject in S. 32, under the general head of statements of deceased or absent persons. This provision goes far beyond the rule of English law, and even that of Act II of 1855. The earlier statute made the admissibility of the declaration dependant upon the pre-existing rules and limitations of English law, but it provided that some hope of recovery entertained by the dying man was not to exclude his dying declaration as evidence. The admissibility of such declarations is based upon the principle that *Memo moriturus praesumitur mentiri*, *i.e.*, that a person lying at the threshold of death may be supposed to be incapable of uttering falsehood. And the consciousness of impending death has been held as equivalent to the sanction of an inviolable oath. But as these form important exceptions to the wholesome rule of law which encludes hearsay evidence, English Judges have always looked upon them with very great jealousy. Several restrictions have therefore been laid down, the first of them being that the declarations are admissible only upon charges of murder or homicide, and with reference to the cause of death. At one time it was thought that such evidence was admissible in civil cases; but this question was settled by *Stobarst* v. *Dryden*, (1 M. and W. 615). Again, in any case where the death of the deceased is not the subject of the charge, dying declarations are not to be admitted in evidence. On an indictment for administering drug to a woman with intent to procure abortion, evidence of her statement as to how she was drugged was excluded, although she had died before the trial (2 B and C. 608). The next condition as to admissibility is that the statement must be made when the declarant is in actual danger, as distinguished from his being in *extremis* (1 Moody 97). Lastly the declaration must be made with consciousness of approaching death. And any hope of recovery lurking in the declarant's mind at the time of the statement would exclude the admission of such a statement. (1 C and p. 157 and L. R. I. C. C. R. 187 at 193.)

This consideration of the strictness of the rules of English law will illustrate the elasticity of the rule established by the Indian Evidence Act. The illustrations under (*a*), to Sec. 32 of the Evidence Act expressly indicate that the declaration, are admissible not only in criminal charges other than those of homicide but also in civil actions. Nor does the Section give effect to the various limitations to the rule under the Common Law of England which we noticed in the last para. Notwithstanding the facilities afforded by the Legislature for the reception of dying declarations, the power of admitting them must be exercised with very great caution. In *R.* v. *Ashton*, Alderson B remarked

"his declarations as to the cause of his death are considered equal to an oath, but they are nevertheless open to observation; for though the sanction is the same, the opportunity for investigating the truth is very different." Again, as Powell, in his book on Evidence, says, these statements are usually given in evidence against one who has had no opportunity of cross-examination; and they are also made when he is exhausted mentally and physically and when, therefore, he is, to some extent, unconscious of the full purport of his declaration. And, as has been observed, falsehood and the passion of revenge must also be guarded against, and this more especially in this country. Judges in India, are therefore, quite alive to the danger of wholesale admission in evidence of dying declarations. And in 25 B. 45, it has been held that when the death is not proved to be the direct result of wounds in the rioting and when the declarant is alive for a week after he made the statement, the declaration must not be admitted in evidence. With greater force would the objection be against the admissibility of statements made by a person who chances to live after the declaration (4 Bom. L. R. 434). Nor is a statement by a witness as to what he heard from the deceased, when it does not relate to the cause of death, come within the scope of dying declarations under Sec. 32, and such evidence is hearsay and inadmissible, (28 Cal. 397). In *Queen* v. *Zuhir* (10 W. R. 11) it was held that the Sessions Judge, before admitting the statement, ought to have directed his attention to the fact whether the declarant believed himself to be in danger of approaching death. But in the light of the clear wording of the section, it is, of course, unnecessary that any such fear or belief should be found by the Judge. A Full Bench of the Allahabad High Court has held that signs made by a deceased woman, in answer to questions put to her, come within the words "verbal statements" and are therefore admissible in evidence (7 All. 385). But the danger to which such an interpretation might lead was fully present to *Mahmood, J.* who, of course, rightly dissented. Although the Indian Legislature has relaxed, to a great extent, the rigidity of the English rule, it is, in the interests of justice, absolutely necessary to bear those limitations in mind when dealing with questions of the kind. And as *Byles, J.* remarked, "dying declarations ought to be admitted with scrupulous, and I had almost said, with superstitious, care."

SYNOPSIS OF CASE LAW (ENGLISH)

Thames & Mersey Marine Insurance Co, v. "Gunford" Ship Co., Sonthem Marine Mutual Insurance Association v. Gunford Ship Co., [1911], *A. C.* 529.

Shipowners brought an action to recover for a total loss under policies of insurance on the hull of a ship during a certain voyage. The insurances were affected. It appears that the master of the vessel has not been at sea for the last 22 years. With regard to the part of the disbursements there was no insurable interest.

There is no obligation on the part of the owners of the vessel to inform the insurers of the past history of the master. The omission to disclose the facts relating to the over-insurance of the vessel does amount to non-disclosure of material circumstances and the contract of insurance is voidable by the insurers.

Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

Smith v. *General Motor Cab Co.* [1911] A. C. 188.

The question whether there was evidence is a question of law.

Lindsay v. *Klein The Tatgana.*

In an action by the owners of a steamship for contribution against the owners of the cargo in the expenses incident to the discharging and re-loading of the cargo:—Under the circumstances of the case when the boilers had to be fed with sea water by means of donkey engine soon after she put to sea, the onus is on the plaintiffs to show that the vessel was sea worthy at the commencement of the voyage.

Glasgo Corporation v. *Lormier* [1911] A. C. 209.

In an action for damages for slander against a municipal corporation by the plaintiff on the ground that one Gilmour, a tax collector in the employ of the defendants used language accusing the plaintiff of having defrauded the defendant corporation and also that he threatened to lodge a complaint against the plaintiff which would result in her being put in gaol for forgery—*held* that the slanderous words of Gilmour gave no cause of action against the defendant corporation as the expression of any opinion by Gilmour is not within the scope of his employment.

James C. Pitman v. *Alexander Crum, Ewing and others* [1911] A. C. 217.

It is well-settled that no person can accept and reject the same instrument. Where a deed or will professes to make a general disposition of property for the benefit of a person named in it such person cannot accept a benefit under it without at the same time conforming to all its provisions and renouncing every right inconsistent therewith.

SYNOPSIS OF CASE LAW (INDIAN).

Suchand v. *Balram*, 38 C. 1.

Where an entire tenure was sold in execution of rent decrees against only some of the tenants and a tenant who was not a party to the suit deposited lawfully the prescribed amount under Sec. 310 A, C. P. C, to have the sale set aside and the sales were set aside, *held* that the plaintiff was entitled to sue the defendants for contribution each according to his share of the decretal debt but not in respect of the deposit of 5 per cent. The scope of Sec. 70 of the Contract Act discussed.

Asad Ali v *Hyder Ali*, 38 C. 13.

Where a claim has been merged in an actual Judgment the right under it is assignable, and the nature of the chose in action is immaterial. Future maintenance awarded by decree when, falling due, can be recovered by execution of the decree, without further suit.

Harendra v. *Grish Chandra*, 38 C. 24.

Sec. 145, Cr. P. C. does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties or to compel their attendence after they had been summoned and they failed to appear. Where a Magistrate has acted in accordance with law, it would be necessary to show the High Court very clearly, for its interference, that the procedure adopted though right in law, has, in fact, amounted to an absolute denial of Justice.

British and Foreign Marine Insurance Co., Ltd. v. *India General Navigation Co. Ltd.*, 38 C. 28.

The rights and liabilities of common carriers in India are outside the Contract Act and are governed by the principles of the English Common Law as modified by the Carrier's Act. A Common Carrier is subjected to 2 classes of liability (1) insurable risks and (2) carrying risks. English Courts in dealing with exemption clauses recognise this distinction and construe them as not extending to carrying risks in the absence of clear words to that effect.

A *fortiori* in India where there is Statutory prohibition against exempting a carrier from loss arising from negligence this canon of construction should be adopted at any rate within the limits implied in the prohibition.

THE WEEK'S CASES.

23rd October 1911.

Benson, J. and Spencer, J.

S. A. 495 of 1910.

The right of pre-emption cannot be pleaded by way of defence by the mortgagee in a suit by the assignee of the mortgagor in a suit brought by him for redemption. The right of pre-emption which is attached to the otti mortgage right by custom stands on no higher footing than a right of pre-emption by virtue of an express contract.

25th October, 1911.

S. A. 722 of 1910.

An amedment can be allowed when the prayer is only for adding another relief which could have been prayed for in the previous suit, since it does not alter the nature of the suit and since the facts are the same. The original relief prayed for is for a declaration that a certain person is an agent and for delivery of account; the amendment asked for is prayer for settlement of the said accounts and for recovery of money. Even though the additional relief prayed for is barred by limitation the amendment is not improper.